(8)

No. 93-1677

In The

Supreme Court of the United States

October Term, 1994

STATE OF OKLAHOMA, *Ex Rel.*
OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JEFFERSON LINES, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF, AND ACCOMPANYING BRIEF, OF GREYHOUND LINES, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, Greyhound Lines, Inc. ("Greyhound") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in this case. Counsel for Respondent, Jefferson Lines, Inc., has consented to the filing of this brief, but counsel for Petitioner, the State of Oklahoma, *ex rel.* Oklahoma Tax Commission (the "Oklahoma Tax Commission"), has declined to consent.

Greyhound operates in the State of Oklahoma and throughout the continental United States as a common carrier providing transportation by bus. Greyhound is the largest provider of bus transportation services in the country and is the only nationwide provider of intercity bus transportation services. Greyhound provides transportation on both intrastate and interstate routes in and through Oklahoma and issues tickets in Oklahoma for transportation originating and terminating in and outside of Oklahoma.

On June 4, 1990, Greyhound and certain of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas, Brownsville Division (the "Bankruptcy Court"), under case numbers 90-00985-B-11 to 90-00990-B-11. In Greyhound's reorganization case, the State of Oklahoma Tax Commission, the Petitioner herein, filed, *inter alia*, a proof of claim in the amount of $906,866.59, which represents an assessment of tax on the proceeds received by Greyhound for tickets issued in Oklahoma during the period

June 1, 1987, to May 31, 1990, except those proceeds on which Greyhound previously had remitted tax and proceeds that Petitioner had determined to be exempt from taxation. As in the instant case, the basis of such proof of claim is that Petitioner asserts that sales taxes are assessable on all transportation tickets "sold" within the State of Oklahoma, whether for intrastate or interstate transportation. In the litigation on the Oklahoma Tax Commission's claim, the Oklahoma Tax Commission and Greyhound stipulated that the Oklahoma Tax Commission was seeking to tax proceeds from all of the following transportation services:

- intrastate routes wholly within the State of Oklahoma;
- intrastate routes wholly within a state other than Oklahoma;
- interstate routes that commence in Oklahoma and terminate in another state;
- interstate routes that commence and terminate in Oklahoma, but pass through another state; and
- interstate routes wholly outside the State of Oklahoma.

In its bankruptcy case, Greyhound objected to Petitioner's claim against it on the same ground as is presented in the instant case, *viz.* that the Oklahoma sales tax statute, as interpreted and applied by Petitioner, is unconstitutional. On February 5, 1993, the Bankruptcy Court sustained such objection and entered an order disallowing the claim of Petitioner. A copy of such order is included as Appendix "A" to Respondent's brief in this

case. On appeal by Petitioner, the United States District Court for the Southern District of Texas, in case number B-93-58 and by order dated October 4, 1993, affirmed the Bankruptcy Court's decision. A copy of such order is included as Appendix "B" to Respondent's brief in this case. Petitioner further appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. After full briefing and oral argument, but before such court rendered its decision, this Court granted Petitioner's petition for a writ of *certiorari*. As a result, the court of appeals entered an order staying any decision on the issues before it until after a decision is handed down in this case.

Because this Court's interpretation of the Oklahoma sales tax statute at issue in this case will be controlling with respect to claims asserted by Petitioner against Greyhound, Greyhound has a strong interest in the outcome of this case. Moreover, as the largest provider of bus transportation services and the only such provider that operates nationwide, the effects of a decision in this case will be felt by Greyhound and its customers more than any other party, including Respondent.

WHEREFORE, Greyhound respectfully requests that this Court grant Greyhound leave to file the annexed brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Does the sales tax imposed by Okla. Stat. tit. 68, § 1354(1)(C) on the gross proceeds received for tickets issued within Oklahoma for interstate transportation services to be provided in whole or in part outside the State of Oklahoma violate the Commerce Clause and/or the Due Process Clause where (i) the State's only nexus with such transportation services is that the ticket evidencing the right to receive such services was either issued or paid for in the State, and (ii) the State fails to apportion the proceeds from such sale of interstate transportation services, which more than one state may tax?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae*, Greyhound Lines, Inc. ("*Amicus* Greyhound"), is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

Under the test adopted by the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a tax on interstate commerce must satisfy four requirements: (i) the tax must be applied to an activity with a substantial nexus with the taxing state, (ii) the tax must be fairly apportioned, (iii) the tax must not discriminate against interstate commerce, and (iv) the tax must be fairly related to the services provided by the taxing state. *Amicus* Greyhound agrees with and adopts the argument of Respondent that the Oklahoma sales tax statute fails all four prongs of this test, and, therefore, must be invalidated as violative of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

Moreover, the constitutional defects of the Oklahoma sales tax statute strike at the two fundamental constitutional principles that underlie the Court's test in *Complete Auto* and its predecessors: (i) that, whether as a matter of application of the Due Process Clause, U.S. Const. amend. XIV, or application of the Commerce Clause, a state must have a sufficient nexus with an activity being taxed to confer constitutional authority on such state to tax all or a portion of such activity, and (ii) that, pursuant to the Commerce Clause, the tax must not discriminate against interstate commerce.

1. Petitioner, the State of Oklahoma, *ex rel.* Oklahoma Tax Commission (the "Oklahoma Tax Commission"), and *Amici Curiae* National Conference of State Legislatures, *et al.* ("National Conference *Amici*") seek to have the Court accept the seemingly simple proposition that the State may so define a transaction as to confer authority upon the State to tax the *entire* value of all activities that comprise such transaction. Such an approach, however, elevates labels over the substance of the taxing statutes and the transactions being taxed, thereby eviscerating the limits upon a state's taxing authority that the Court consistently has recognized. By basing its authority to tax the full value of interstate transportation services on a tautological claim that a "sale" occurs in Oklahoma if a ticket is purchased in that State without regard to whether the transportation services to be provided originate, terminate, or occur wholly outside of Oklahoma, the Oklahoma Tax Commission stretches the requirement of a nexus beyond any notion of sufficient contacts that previously has been accepted by the Court or even the state courts that have applied constitutional principles in order to police the statutes of their own state.

The contacts that are required before a state may tax the full value of a transaction are different, and more substantial, than those required for a state to impose an administrative duty on an entity. The arguments of Petitioner that even minimal contacts are sufficient to permit taxation of the full value of activities bearing little or no relation to the taxing state would create a new theory of law under the Commerce Clause and the Due Process Clause, with far reaching effects upon commercial transactions.

2. If the Court does permit a state to tax the full value of a transaction by virtue of a single act within the state, the Court will be opening the door to multiple taxation of a unitary figure by states, without imposing any compensating requirement that such taxation be apportioned. In the absence of a principle that looks to the decisions of the Court, not state-created labels, to define taxable transactions, multiple taxation of interstate transactions by states with tenuous connections to the transactions is almost certain to occur. Especially where, as in the case *sub judice*, the State never even attempts to apportion its tax or to credit any additional taxes that may be imposed on the taxpayer, the statute on its face and by its effect imposes a higher cost on the purchaser of interstate goods and services than on one dealing in a wholly intrastate transaction. Therefore, the Oklahoma sales tax statute is discriminatory and violates the Commerce Clause.

3. Moreover, the sales tax at issue is constitutionally indistinguishable from the gross receipts tax that the Court invalidated in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). As a result, the Oklahoma sales tax statute should be invalidated on *stare decisis* grounds.

ARGUMENT

Pursuant to title 68, section 1354 of the Oklahoma Statutes, the Oklahoma Tax Commission has sought to collect from Respondent and from *Amicus* Greyhound the full value of proceeds received from the issuance of all bus transportation tickets in Oklahoma.[1] Although the Oklahoma sales tax statute defines a "sale" as occurring when services are furnished or rendered,[2] for purposes of this case, Petitioner and National Conference *Amici* have interpreted a "sale" under section 1354(1)(C) as occurring either upon the issuance of a bus transportation ticket or the payment for such ticket. As a result, the Oklahoma Tax Commission asserts a right to tax the full

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[1] Okla. Stat. tit. 68, § 1354 (Supp. 1988) provides, in pertinent part, as follows:

> (1) There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:
>
> * * *
>
> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;
>
> * * *

[2] Pursuant to Okla. Stat. tit. 68, § 1352(L)(4), "sale" is defined with respect to services as "[t]he furnishing or rendering of services taxable under this article."

value of all proceeds received from so-called sales in Oklahoma of tickets. In fact, in the bankruptcy case of *Amicus* Greyhound, the Oklahoma Tax Commission stipulated that it seeks to tax proceeds from all of the following transportation services:

- intrastate routes wholly within the State of Oklahoma;
- intrastate routes wholly within a state other than Oklahoma;
- interstate routes that commence in Oklahoma and terminate in another state;
- interstate routes that commence and terminate in Oklahoma, but pass through another state; and
- interstate routes wholly outside the State of Oklahoma.

Under the definition of "sale" created by the Oklahoma Tax Commission – which purports to give the Oklahoma Tax Commission the authority to tax the full value of the foregoing transportation services so long as tickets for them are issued and/or paid for in Oklahoma – the Oklahoma sales tax statute violates the Due Process Clause and the Commerce Clause.

In *Complete Auto*, the Court developed its latest test for determining the constitutionality of a state tax under the Commerce Clause. Under that test, a tax on interstate commerce is valid if it satisfies four requirements: (i) the tax is applied to an activity with a substantial nexus with the taxing state; (ii) the tax is fairly apportioned; (iii) the tax does not discriminate against interstate commerce, and (iv) the tax is fairly related to the services provided

by the taxing state. 430 U.S. at 279. As set forth by Respondent, under such test, the Oklahoma sales tax statute is constitutionally defective. *Amicus* Greyhound agrees with such analysis and wholly adopts it.

A more narrow focus on the two principal underpinnings of the *Complete Auto* test, however, demonstrates that the Oklahoma sales tax statute, as interpreted and applied by Petitioner, violates the constitutional principles that lie at the heart of the *Complete Auto* test: (i) under principles of due process and pursuant to the Court's Commerce Clause decisions, a state's power to tax transactions is restricted to "taxable transactions" occurring within the state, and (ii) under the Commerce Clause, the state may not pass a tax or regulation that, either on its face or in its effect, discriminates against interstate commerce. Under these two essential constitutional principles, the Oklahoma sales tax statute does not pass constitutional muster.

I. The Oklahoma Tax Commission, By Seeking to Tax Transactions That May Occur Wholly Outside of Oklahoma, Is Taxing Beyond Its Constitutionally Permissible Boundaries.

Throughout the permutations of the Court's test under the Commerce Clause, the Court has focused repeatedly on the scope of a state's authority to tax transactions. In its early cases, the Court focused simply on "the limits of state power" and whether activities and transactions sought to be taxed were "made beyond the state limits." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327,

329-31 (1944). In the wake of *Complete Auto*, a state's authority to tax is determined by reference to whether "the tax is applied to an activity with a substantial nexus with the taxing State . . . and is fairly related to the services provided by the State." 430 U.S. at 279. In *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1919 (1992), Justice White, concurring in part and dissenting in part, argued that the doctrinal origins for *Complete Auto's* nexus requirement derive from the fairness inquiry required by the Due Process Clause and that the *Complete Auto* nexus requirement simply seeks to determine whether the activity being taxed has a "sufficient connection to the State to give 'jurisdiction to tax.' " (*quoting Freeman v. Hewit*, 329 U.S. 249, 271 (1946)). *See also United Air Lines v. Mahin*, 410 U.S. 623, 640 (1973) ("under the Due Process Clause of the Fourteenth Amendment, Illinois has no jurisdiction to tax the use of property occurring in another State.") (White, J., dissenting); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948) (Rutledge, J., concurring) (noting that, *inter alia*, franchise tax on the value of capital invested or employed in the taxing state was "clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned."). That the *Complete Auto* test, at a minimum, resembles a due process analysis is also seen by its characterization by the Court as "a fair measure of the State's contacts with a given commercial transaction." *Itel Int'l Containers Corp. v. Huddleston*, 113 S. Ct. 1095, 1104 (1993). Under any statement of the principle or its origins, in considering the constitutionality of states' efforts to tax, the Court has not relied upon states' characterizations of their own taxes, but has made its own determination of

what constitutes the "taxable transaction," what contacts the state has with such taxable transaction, and whether such contacts are sufficient to justify imposition of the tax on that transaction by the state. This approach has been fundamental to the Court's consideration of state taxes on interstate commerce throughout the years.

A. In Determining the Nature and Validity of a Tax, the Court Looks Beyond State-Created Labels to the Nature of the Activity Being Taxed.

In determining the nature and validity of a tax, the Court has inquired into the practical effect of a tax and has refused to allow labels created by the state or by the parties to the transaction to govern the Court's own characterization of the nature of the tax and the transaction. In *Complete Auto*, the Court signalled its intent to look beyond "the formal language of the tax statute" and to focus instead on "its practical effect." 430 U.S. at 279. The Court reemphasized that principle in *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 374 (1991), in which it stated that, simply because the state had labelled its single business tax as a tax on "business activity" did "not permit [the Court] to forgo examination of the actual tax base and apportionment provisions. . . . 'A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.' " (*quoting* Jenkins, *State Taxation of Interstate Commerce*, 27 Tenn. L. Rev. 239,

242 (1960)).[3] *See also Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) ("when considering the purpose of a challenged statute, this Court is not bound by the 'name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law.") (*quoting Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924)).

Likewise, that Petitioner and National Conference *Amici* have characterized the Oklahoma sales tax statute as a "garden-variety" tax on a transaction that they characterize as wholly local in character is not binding on the Court and not determinative of the true nature of the tax. That Petitioner and National Conference *Amici* claim that the Oklahoma Tax Commission is seeking to impose a tax "only" on the local transaction of the "sale" of a bus transportation ticket does not determine whether Oklahoma, in fact, has the authority to impose a tax on the full value of transportation services without regard to where such services are being rendered. To accept otherwise would be to allow a state to select an arbitrary point at which a transaction intersects with the state and to hobble interstate commerce by defining such activity as a wholly-local "taxable transaction" to support taxation of the full value of a transaction. Not only would such an approach likely inspire states to new heights of legislative

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[3] Although Petitioner may argue that the Oklahoma sales tax statute is a tax on a ticket measured by the value of the ticket, such an argument should be summarily rejected because the ticket has no intrinsic value; it is merely evidence of the right to receive the transportation services from which the price of the ticket is derived. *See infra* p. 14.

creativity,[4] but such an approach also would be directly contrary to how this Court previously has analyzed and reviewed state taxing statutes.

B. Sufficient Contacts to Impose a Sales Tax Only Exist in the Jurisdiction Where the Goods Are Delivered or the Services Are Rendered.

This Court, as have numerous state courts interpreting their own statutes, has determined that a "sales tax is a tax on the *receipt* of that which was purchased." *McLeod*, 322 U.S. at 334 (emphasis added). As a result, the Court has required a "taxable transaction" to occur in the state seeking to impose a sales tax and has defined a taxable transaction upon which a sales tax can constitutionally be imposed as the "transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 49 (1940).

In *Berwind-White*, the Court specifically distinguished New York City's sales tax on coal delivered to New York City but mined in Pennsylvania by a Pennsylvania corporation from an unapportioned gross receipts tax that was found to be unconstitutional in *Adams Mfg. Co. v. Storen*,

[4] For example, under the view of Petitioner and National Conference *Amici*, a state presumably could define a "sale of services" as occurring upon the (i) entry of the parties into a contract, (ii) payment under the contract, or (iii) delivery of services under the contract, whichever activity first occurs within the state, and, because the state simply was seeking to impose a "local" sales tax, it could tax the entirety of the transaction, even though at least two other states could also claim a right to impose a sales tax under such definition.

304 U.S. 307 (1938), on the grounds that "the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption." *Berwind-White*, 309 U.S. at 58. In contrast, in *Adams*, a state sought to impose a gross receipts tax on a company's *entire* income notwithstanding that 80% of that income was derived from goods delivered out-of-state. *Adams*, 304 U.S. at 308-09. The Court in *Adams*, in discussing another tax, specifically noted that, "[i]f the tax there had been a sales tax the city could not have measured it by sales consummated in another state." *Id.* at 313.

In *McLeod*, the Court invalidated the imposition of a sales tax by Arkansas on an interstate purchase of goods because the goods were received by the buyer's agent (the shipper) in Tennessee, and the sale, therefore, occurred in Tennessee, 322 U.S. at 330. *See also McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70, 76-77 (1940) (on the basis of *Berwind-White*, upholding New York City's sales tax on orders taken within New York City and possession of which was transferred there, even though orders were approved in different states and remittances were made out-of-state). In *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 347-48 (1944), the Court upheld a gross receipts tax on the proceeds from various interstate transactions, all of which had as their common denominator the agreement to sell *and* the delivery of goods within Indiana, noting that there was no "constitutional difference" between such case and *Berwind-White*. *Id.* at 348. In doing so, though, the Court attached significance to the fact that the "taxable transaction" was "at the *final stage* of an interstate movement" and that Indiana simply sought "to tax gross receipts from interstate transactions

consummated within its borders." *Id.* at 347-49 (emphasis added).

Since *Berwind-White*, it has been treated as axiomatic that the mere purchase in a state – without the actual delivery in the state – is not sufficient to justify imposition of a sales tax by such state. In other words, "an out-of-state buyer who purchases goods in New York City and takes them with him pays the tax, while if he has them shipped to him, he pays no sales tax." *United Air Lines*, 410 U.S. at 637 (Douglas, J., dissenting). *See also Evco v. Jones*, 409 U.S. 91, 93 (1972) (New Mexico could not include income of New Mexico business from sales of tangible personal property out-of-state in assessing gross receipts tax because "a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce").[5] By imposing a sales tax based solely upon the issuance of a ticket or the receipt of payment, and wholly without connection to the actual delivery of that which was purchased (*i.e.*, the bus transportation), the Oklahoma Tax Commission seeks to do precisely that.

In the context of a sale of "pure" services (*i.e.*, services other than those performed on a tangible good that comes to rest in a state, such as a computer program), the "delivery" or the "receipt" of such services occurs when

[5] Conversely, if the goods are delivered out-of-state and, therefore, not subject to a sales tax, then the state in which the goods are "used" may impose a use tax on the purchaser. *See Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, 68 (1939); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937).

the services are provided. In the instant case, the "delivery" or "receipt" of services is complete only when a passenger arrives at his or her destination. Nevertheless, the Petitioner claims that the Oklahoma sales tax statute may constitutionally tax the entire value of such service even if no part of such delivery or receipt occurs within Oklahoma.[6] All that a consumer "purchases" when he or she receives a bus transportation ticket in Oklahoma, however, is the right to enjoy the transportation services provided by the bus company issuing the ticket. As such, the transaction bears more resemblance to the purchase of a commodity that will be shipped interstate to the purchaser than to the transaction in which the commodity is delivered within the taxing state. In fact, unlike the purchase of a commodity in which the purchaser may elect to take delivery either in the taxing state or out of the taxing state, here the "good" being purchased is interstate transportation itself, and interstate commerce is a necessary component of the transaction.

Notwithstanding the extended history of cases of this Court that focus on the delivery of commodities as the sole taxable transaction that confers jurisdiction upon a state to impose a sales tax, Petitioner and National Conference *Amici* argue that, for purposes of imposing a sales tax, the taxable transaction is *not* delivery, but some ill-defined event that they call a "sale." This tautological

[6] Although, as cited in *supra* note 2, the Oklahoma sales tax statute defines a sale of services as occurring upon the "furnishing or rendering of services," the Oklahoma Tax Commission has chosen not to accept the literal terms of the statute and has instead created its own concept of "sale."

approach attempts to imbue the issuance of a "receipt" with such a significance that the sale of interstate transportation magically is transformed into a wholly intrastate transaction.

The Eighth Circuit Court of Appeals in this case, however, correctly recognized that the item being taxed by the Oklahoma Tax Commission is not the "intrastate" transaction of paying for a mere bus ticket, but the right to receive such service:

> In essence, the Commission argues that the taxable activity is the sale of a ticket, not of transportation. This argument is too technical and flies in the face of how bus-ticket prices are set. A ticket price is set, at least partially, on the number of miles travelled. To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

In re Jefferson Lines, Inc., 15 F.3d 90, 92 (8th Cir. 1994). Nearly fifty years ago, the Court, in invalidating a state tax on the gross receipts of a bus company because the state sought to tax receipts relating to transportation outside the state's borders, rejected a similar attempt to characterize interstate bus transportation as a local transaction:

> Of course we are dealing here with "interstate commerce." . . . In a case like this, nothing is gained, and clarity is lost, by not starting with recognition of the fact that it is interstate commerce which the State is seeking to reach and candidly facing the real question whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.

Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 661 (1948).

The characterization of the mere issuance of or payment for a bus ticket as the "sale" of transportation and the "taxable transaction" upon which a state sales tax may constitutionally be predicated is not only inapposite to *Central Greyhound* and the Court's decisions relating to the taxation of commodities, but it also is contrary to the analysis the Court has adopted in the few cases in which it has addressed the sale of services. In *Goldberg v. Sweet*, 488 U.S. 249, 256 (1989), a tax by the State of Illinois on interstate telecommunications required both that the telecommunications (i) either have originated or terminated in the State *and* (ii) be charged to a service address in the State. Although all parties agreed that the State had a sufficient nexus with the taxed interstate telecommunications, in response to the concern of multiple taxation, the Court stated its view that only two states would have a substantial enough nexus to tax a consumer's purchase of an interstate telephone call:

> The first is a State like Illinois which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the

origination or termination of an interstate telephone call billed or paid within that State.

Id. at 263. Thus, under *Goldberg,* the Court would require *both* that the services performed relate to the taxing state (*i.e.,* origination or termination of the telephone call) *and* that there be a connection with the taxpayer (*i.e.,* maintenance of a service address within the taxing state, receipt of bills within the taxing state, or paying bills within the taxing state) in order for a state to impose a valid tax on interstate services.

In *Itel,* the Court addressed the permissibility of a sales tax imposed by the State of Tennessee on the proceeds derived from the lease of cargo containers delivered in Tennessee. In upholding the tax against a challenge that it violated, *inter alia,* the foreign commerce clause, the Court stressed that the tax was not a tax on goods, "but a tax on a business transaction occurring within the taxing State. . . . Tennessee's sales tax is levied on leases transferring temporary possession of containers to third parties in Tennessee. . . . " 113 S. Ct. at 1106. The Court considered this taxable business transaction, which may have been negotiated in a different state and payment for which may even have been remitted to a different state, to be a "discrete transaction occurring within the State" simply because the lessor's performance under the lease – the delivery of the cargo containers – occurred in Tennessee. *Id.* at 1098, 1104. *See also Complete Auto,* 430 U.S. at 275 n.2 (specifically noting that the tax on the gross proceeds of sales "has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State.");

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 255 (1941) (upholding taxation of gross receipts received from enamelling process performed within the state on items belonging to out-of-state customers because the enamelling services were performed entirely intrastate, and interstate transportation was "but incident to that intrastate business"); *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 260 (1938) (upholding state's tax on amounts received from the sale of advertising space in a trade journal where all the services upon which the tax was based – the preparation, printing, and publication of the advertising – and the receipt of the consideration occurred in the taxing state and not elsewhere).[7]

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[7] In policing their own statutes, state courts also have viewed the taxable event, for purposes of determining whether a sales tax was constitutional, as the time of delivery of the services. *See Union Pac. R.R. Co. v. Auditing Div.,* 842 P.2d 876, 882 (Utah 1992) (noting that Utah imposes a sales tax on certain services that occur in Utah and a compensating use tax on services performed out-of-state on property that comes to rest in Utah); *LeTourneau Sales & Serv., Inc. v. Olsen,* 691 S.W.2d 531, 536 (Tenn. 1985) (a tax imposed on repair services performed in Tennessee for out-of-state customers was constitutionally permissible where the "service was performed in Tennessee and the transaction was taxed as a service and not a sale. . . . The taxable event is the rendering of repair services in Tennessee."); *Corning Lab., Inc. v. Iowa State Dept. of Revenue,* 270 N.W.2d 463, 465 (Iowa 1978) (sales tax imposed on services performed for out-of-state customers was constitutional where all of the services against which the tax was levied were performed in the taxing State); *McKeigny v. Dunn Bros., Inc.,* 80 So. 2d 802, 807 (Miss. 1955) ("sales tax" on gross income derived solely from intrastate transportation is constitutional).

Because the purchased services were performed in the state seeking to impose the tax, all of such cases can fairly be characterized as "garden-variety sales taxes." In each of such cases, the interstate commerce was "but incident" to the local activity being taxed. In the instant case, however, the converse is true – the local activity, the issuance of a bus transportation ticket, is "but incident" to the interstate commerce, the very "commodity" being sold, the very service that is being taxed. By taxing the entire price of a transportation ticket for travel from, for example, New York to California, on the sole basis that the transportation ticket was issued from an office in Oklahoma, the Oklahoma sales tax is anything but a "garden-variety tax."

C. In the Absence of a Sufficient Nexus Between an Activity to Be Taxed and a Taxing Jurisdiction, the State Lacks Constitutional Authority to Impose a Tax on the Activity.

To adopt a test that permits a state to tax interstate transportation services by allowing the state to define a taxable transaction as occurring where a ticket is issued or payment is made would establish so novel and minimal a requirement of sufficient nexus in the context of interstate commerce as to invite states to engage in creative exercises to extend the reach of their taxing authority. If the Court were to hold that issuance of a ticket or payment therefor constitutes an appropriate nexus for taxing the entire value of a sales transaction, then it also necessarily would have to conclude, contrary to well-settled expectations, that the full value of an in-state purchase of goods to be shipped out-of-state similarly

would be subject to the imposition of a sales tax by the state in which the purchase was made.[8]

It is clear, though, that the standard for determining if a state can constitutionally tax a particular activity (*i.e.*, whether a state has a sufficient "nexus," whether a state has sufficient "contacts" to tax a transaction, or whether a state has "jurisdiction to tax") differs from the standard for determining whether, assuming a perfectly valid tax, the state can impose a duty to collect the tax. As such, the due process analysis employed by the Court in *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977), and relied upon by Petitioner is inapplicable to the instant case. In *National Geographic*, the sole issue before the Court was whether a corporation that maintained offices in California could be required by the State of California to collect use taxes imposed against California residents who purchased the corporation's products even though the corporation's activities in California were unrelated to the activities for which the tax was imposed. *Id.* at 554. No one disputed whether the tax – as here, a tax on the purchaser, not the seller – could be imposed on the purchaser. *Id.* at 555. Likewise, no one

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[8] Of course, that is not to say that, if the activity that the State wishes to tax is literally the issuance of a receipt within that State, the State does not have a sufficient nexus to tax such activity; the State simply does not have a sufficient nexus to tax the full value of all activities related to that isolated event. To the extent of the value of such activity, the State could have a sufficient nexus to impose a tax; however, the receipt itself has no intrinsic value, and, therefore, the value of the activity on which such tax could be based would be *de minimis*.

disputes that Respondent, *Amicus* Greyhound, and other similarly situated companies could be required to (and, in fact, do) collect taxes on behalf of the State of Oklahoma and remit them to the State. Whether the State may constitutionally impose such taxes, however, is a different issue, and, as the Court recognized in *National Geographic*, whether the State may constitutionally impose such taxes requires a more stringent level of review. *See id.* at 560 ("However fatal to a direct tax a 'showing that particular transactions are dissociated from the local business' . . . such dissociation does not bar the imposition of the use-tax-collection duty.") (citations omitted).

Under the *National Geographic* test, the Court examines the contacts between the *entity* collecting the tax and the taxing state, whereas, under the *Complete Auto* test the Court examines the contacts between the *activity* sought to be taxed and the taxing state. Even if both tests ultimately derive from a due process analysis, "[i]t is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process." *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 653 (1950) (Douglas, J., concurring).

II. The Oklahoma Tax Commission's Attempt to Tax the Entire Value of Transactions Involving Interstate Transportation Without Regard to the Limited Nature of Oklahoma's Contact with the Transactions Is Plainly Discriminatory.

Whether under the fourth prong of *Complete Auto* or under the general Commerce Clause jurisprudence developed by the Court, it is clear that a statute is discriminatory, and, therefore, unconstitutional, when, like the

Oklahoma sales tax statute, more than one state has taxing jurisdiction over the activity taxed, and the state taxes a unitary figure without apportionment, without varying the tax directly with some proxy for value obtained from the state. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 291 (1987); *Western Live Stock*, 303 U.S. at 255 ("local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. . . . [T]hey have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.") (citations omitted); *Berwind-White*, 309 U.S. at 57 ("a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce.").

At least as early as the *Adams* case, the Court recognized the constitutional problems associated with a tax on a unitary figure, such as gross receipts from a sale, that does not provide an apportionment formula:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce;

> and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

304 U.S. at 311 (footnotes omitted). *Compare, Trinova*, 498 U.S. at 387 (upholding Michigan's form of value-added tax, which provided a formula for attributing value to the State). The Oklahoma sales tax statute makes no attempt to apportion any of the tax on the sale of transportation services to the value of the actual services provided in the State – even if it merely is the value of the services relating to supporting ticket offices, as compared to the value of the transportation services themselves – or any credit for other taxes imposed on the passenger taxpayer by other taxing jurisdictions. Consequently, the Oklahoma sales tax statute, even if it is found to have a sufficient nexus with the activity taxed to confer authority on Oklahoma to tax such activity, is not constitutionally permissible.

Moreover, if the Oklahoma sales tax on interstate transportation is considered to have a sufficient nexus with Oklahoma to enable Oklahoma to tax the full value of transportation services occurring wholly outside the borders of Oklahoma, then the risk of multiple taxation of purchasers of interstate transportation is increased and becomes much more significant. Upholding the Oklahoma sales tax statute under such a liberal nexus standard and without requiring apportionment would provide a green light to states to "export tax burdens and import tax revenues" without providing any "practical or

theoretical justification" for doing so. *Trinova*, 498 U.S. at 374. For example, based upon a limited nexus requirement, a state might seek to tax the entire value of transportation services at any of the following points:

- the state of origination;
- the state of destination;
- any state through which the bus travels;
- the state in which the ticket is issued; or
- the state in which the consideration passes.

Under the liberal nexus standard proposed by Petitioner and National Conference *Amici*, in each such case the state may argue that a "taxable transaction" occurred because the delivery or receipt of services occurred in such state for which the state has provided related services – police and fire protection for the travelling passengers, the bus terminals, and the rest stops and maintenance of the state's highways are but two services upon which such a state could claim that the tax is "fairly related" to the services provided. Moreover, if minimum contacts with the taxpayer are all that is constitutionally required to impose a tax, the state in which a passenger resides (even if the bus does not pass through such state) might be said to have sufficient contacts to impose a tax on the passenger.

Although apportioned taxation by multiple states with connections to a transaction is not necessarily objectionable, a decision that upholds a tax, such as the Oklahoma sales tax, that taxes the full value of transportation services without even requiring that any portion of such services be performed in the taxing state would provide

little incentive for other states to apportion taxes in these situations. Such a decision would provide little, if any, constitutional barrier for states in which the services actually are rendered from similarly taxing the full value of such services based upon some state-created concept of a purely "local" transaction.

Petitioner and National Conference *Amici* suggest that no risk of multiple taxation exists because (i) any tax imposed by other states would not be called a "sales tax," and (ii) any tax imposed by other states would be imposed on a different taxpayer (*i.e.*, the transportation carrier, not the passenger). Unfortunately, that is not the case. If the Court accepts the proposition that a state constitutionally may apply its own label and thereby transform a transaction into a "sale" without requiring the delivery of goods or services, little prevents states from applying their own definitions of "sales" to transactions. Moreover, even absent such actions by other states, passengers clearly would be subject to use taxes in every state that could claim that some portion of the transportation services are "used" in that state.[9] Whether such

[9] An example of a sales and use tax on transportation services can be found in the short-lived tax on services enacted by the State of Florida legislature on July 1, 1987, and repealed by the legislature effective January 1, 1988. Pursuant to Fla. Stat. ch. 212.059(5) (repealed 1988), transportation services were considered sold and used according to the following rules of interpretation:

> (a) Interstate and international transportation services shall be considered sold or used in this state to the extent that the sales price or cost price of the service is apportioned to this state pursuant to paragraph (b).
>
> (b) The sales price of the sale of interstate or international transportation services, or the cost price of the use of interstate or international transportation services,

additional taxes are denominated "use" or "sales" taxes should not be relevant for purposes of determining the risk of multiple taxation because it is recognized that a use tax is simply a compensatory tax for a state that does not otherwise have the constitutional nexus to impose a sales tax. *Henneford*, 300 U.S. at 581.

> shall be apportioned to the state as provided in this paragraph. There shall be included in the measure of the tax imposed by this part on the sale or use of interstate or international transportation services one-half of the sales price or cost price of the Florida service provider if the point of origin of the transportation service is in Florida, and one-half of said price if the point of termination is in Florida for the service transaction in question. For purposes of this paragraph:
>
> 1. "Florida service provider" means the person providing transportation services in Florida regardless of the commercial domicile of such person; and
>
> 2. "Point of origin" and "point of termination" mean the physical location at which the Florida service provider begins or ends movement of the property which is being transported, respectively.

Purely intrastate transportation was covered under Fla. Stat. ch. 212.0591(9) (repealed 1988), which provided, in pertinent part, as follows:

> For purposes of determining where the benefit of the service is enjoyed, the following provisions shall be applicable:
>
> (a) If the purchaser is an individual not acting as a business, and:
>
> * * *
>
> 3. . . . [T]he benefit of the service shall be presumed to be enjoyed where the greater proportion of the service is performed, based on costs of performance.

In short, because the Oklahoma sales tax statute does not allocate the sales tax by miles travelled within Oklahoma, the interstate traveller necessarily is paying more for each mile of services, if any, rendered within Oklahoma than the passenger who limits his or her travel to within the boundaries of Oklahoma.[10] As such, the Oklahoma sales tax statute is "plainly discriminatory." *Scheiner*, 483 U.S. at 286. The only alternative to avoid multiple taxation where tangential nexuses such as Petitioner's are permitted and where states such as Petitioner do not voluntarily allocate or provide credits for other state taxes, is to impose upon courts the burden of determining which state may more properly tax an entire transaction, a task that courts simply are not suited to perform.

Moreover, no justification exists for not requiring apportionment in a situation, such as the one presented here, in which the Court already has recognized the feasibility of apportioning a tax based upon actual miles travelled within a state. *See Central Greyhound*, 334 U.S. at 663. Only in the limited circumstances presented in *Goldberg* did the Court find apportionment unnecessary. There, the Court found that the risk of multiple taxation was limited because (i) only two states would have a

[10] Unlike in *Central Greyhound*, in neither the instant case nor *Amicus* Greyhound's case has any party agreed that the Oklahoma sales tax statute can, as a matter of state law, be construed to provide for apportionment. *See Central Greyhound*, 334 U.S. at 664. Therefore, if the Oklahoma sales tax statute is invalidated, absent a determination that the Oklahoma sales tax statute may be interpreted to provide for apportionment as a matter of Oklahoma law, the Oklahoma Tax Commission should not be permitted to "reform" its statute retroactively.

sufficient nexus to tax the transaction, (ii) unlike other cases before the Court involving the movement of goods or the instrumentalities of interstate commerce, apportionment was impracticable, and (iii) actual multiple taxation was precluded by a statutory credit provision. 488 U.S. at 264-65. Indeed, the Court specificallv distinguished *Goldberg* from *Central Greyhound*, an interstate bus transportation case that is virtually indistinguishable from the instant case, on the ground that *Central Greyhound* "dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State." *Id.* at 264.

III. Because the Instant Case Is Virtually Indistinguishable from *Central Greyhound*, the Tax Should Be Invalidated on *Stare Decisis* Grounds.

In analyzing state taxes on Commerce Clause grounds, this Court has concluded that no constitutional distinction exists between sales taxes and taxes on gross receipts. In *International Harvester*, the Court rested its reasoning about the constitutionality of the Indiana Gross Income Tax Act, which allowed recovery of income taxes from a seller based upon its gross proceeds derived from sales in Indiana, upon its earlier cases dealing with sales taxes. The Court concluded that, for purposes of the Commerce Clause analysis, any factual differences between the two types of taxes held no constitutional significance:

> It is of course true that in the Felt & Tarrant Mfg. Co. cases taxes of different names were involved. But we are dealing in this field with

> matters of substance not with dialectics. . . . In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. . . . There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. . . . Each is in substance an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. *But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead.*

322 U.S. at 347-48 (emphasis added). Given the similarity between gross receipts taxes and sales taxes, as discussed below, the instant case is indistinguishable from the Court's decision in *Central Greyhound*, and, therefore, the Oklahoma sales tax statute should be invalidated on *stare decisis* principles.

In *Central Greyhound*, a bus company challenged the constitutionality of imposing a New York State tax on a bus company's entire gross receipts obtained from trips that originated from a point in New York and terminated at a point in New York, but which passed through other states during the course of the trip. The Court struck down the taxing statute because the State's failure to apportion the gross receipts based upon the percentage of the actual mileage traveled within the State made "interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" 334 U.S. at 662-63 (citations omitted). In order to pass constitutional muster, "[t]he tax may be 'fairly

apportioned' to the 'business done within the state by a fair method of apportionment.'" *Id.* at 663 (citations omitted).

Central Greyhound has remained as established precedent of this Court for nearly fifty years, and, as recently as the *Goldberg* decision, the Court ratified its apportionment principles as applied to bus transportation services. 488 U.S. at 264. Companies such as *Amicus* Greyhound and Respondent, which may be subject to substantial penalties if the principles of *Central Greyhound* are now discarded, are entitled to have relied upon its holding in determining whether to collect and remit taxes that, viewed in the context of *Central Greyhound*, appear constitutionally unwarranted. The Court has "long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what [the Court has] done.'" *Quill Corp.*, 112 S. Ct. at 1923 (Scalia, J., concurring in part and concurring in the judgment).

The facts of the instant case fall squarely within the holding in *Central Greyhound*, and, thus, the principle of *stare decisis* should be respected in this case. Pursuant to the Oklahoma sales tax statute, the Oklahoma Tax Commission seeks to tax the entire value of the interstate transportation that is being purchased, even if the interstate transportation occurs wholly outside the borders of Oklahoma. The Oklahoma sales tax statute makes no attempt to allocate the tax based upon miles traveled within Oklahoma, and it provides no credit for taxes paid to other jurisdictions. This is exactly the constitutional infirmity that the Court found in *Central Greyhound*, and *Amicus* Greyhound respectfully submits that the Court should reaffirm that holding in the instant case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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